A

Kho Whai Phiaw v Chong Chieng Jen

HIGH COURT (KUCHING) — ELECTION PETITION NO 26–01 OF 2008–1

B CLEMENT SKINNER J

24 SEPTEMBER 2008

C *Election — Offences — Corrupt practices — Bribery — Elements of — Whether element of 'bargain' essential — Election Offences Act 1954 s 10*

Election — Offences — Undue influence — Elements of — Knowledge and consent, how inferred — Election Offences Act 1954 s 9

D

Election — Petition — Allegation of corrupt practice — Proof of — Whether a single act of corrupt practice sufficient — Election Offence Act 1954 s 32(c)

E

Election — Petition — Allegation of corrupt and illegal practices — Allegation of corrupt practice of undue influence and bribery — Petition failed to state corrupt practices were 'in connection with the election' — Whether respondent misled as to case that had to be met — Petition failed to state name of persons unduly influenced or bribed — Whether petitioner's omission of fundamental nature

F

Election — Petition — Application for declaration that election null and void — Allegation of corrupt practice of undue influence and bribery — Failure to plead s 11(1)(b) Election Offences Act 1954 — Whether rendered all charges specified in election petition fundamentally defective — Election Offences Act 1954 ss 9(1), 10(a), 11(1)(b), 32(c)

G

H

Evidence — Burden of proof — Standard of — Allegation of corrupt practice in election petition — Whether corrupt practice of a quasi-criminal nature — Whether onus on petitioner to prove corrupt practice beyond reasonable doubt

I

Words and Phrases — 'corrupt practice' — Election Offence Act 1954 s 32(c)

In the General Elections of 8 March 2008, the respondent representing the

Democratic Action Party ('DAP'), won the Bandar Kuching Parliamentary seat by a majority of 9,952 votes. The appellant, an elector in the constituency of Bandar Kuching, petitioned the High Court to have the election of the respondent declared void. The petitioner alleged that the respondent had engaged in the corrupt practice of undue influence and bribery, to procure his victory. The petitioner made five charges against the respondent in his petition. With regard to the undue influence charges, the petitioner complained that the respondent, in order to induce the non-Muslim and Chinese voters to vote for him, had interfered with the voters' free choice of vote by, inter alia, threatening them with physical or spiritual harm. The respondent was alleged to done this, inter alia, by publishing or allowing to be published with his knowledge and consent on his website, a letter from one Mr Smith said to contain certain threatening statements alleged to have had the effect complained of on the voters in the constituency. The respondent was also said to have exerted undue influence by publishing or causing to be published certain pamphlets and or statements. With regard to the bribery allegation, the petitioner claimed that the respondent had promised to give the voters a 'Malaysia Bonus of up to RM6,000' for those with household income of RM6,000 or less per annum by publishing and distributing or it being published and distributed with his knowledge or consent the 'DAP 2008 ELECTION MANIFESTO' in which the alleged promise was made. The respondent submitted that the election petition was defective and ought to be dismissed for the following reasons: (i) the charges specified in the petition failed to plead the relevant section of the Election Offences Act 1954 ('the Act') relating to the offence of corrupt practice; (ii) the charges failed to state that the offences were 'in connection with the election'; and (iii) the charges failed to allege or plead the names of the persons alleged to have been unduly influenced or bribed.

Held, dismissing the petition with costs:

(1) The allegation of corrupt practice is of a quasi-criminal nature since a finding of corrupt practice entails penal consequences. The onus is on the petitioner to prove corrupt practice by proof beyond reasonable doubt as in criminal cases. *S Harcharn Singh v S Sajjan Singh & Ors* (1985) AOR 236 (followed); *Gurdial Singh Nijar v KS Balakrishnan* [1993] 2 CLJ 75 (followed) (see para 9).

(2) The expression 'corrupt or illegal practice' is equivalent to 'corrupt practice or illegal practice'. The word 'practice' applies even to a single act and is not confined to habitual repetition of the action. A single act of the nature given in that section would be a corrupt practice (see para 11).

(3) Although the petitioner did not state in his petition that the offences allegedly committed by the respondent were 'in connection with the election', the petitioner had stated that the acts of corrupt practice were in relation to 'the said election'. By such references, the petitioner had sufficiently indicated to the respondent that the alleged offences committed were in connection with the election without having to use the words 'in connection with the election'. Further, no prejudice was caused to the respondent. He could not have been confused or misled as to the case he had to meet even though the words 'in connection with the election' were not used (see para 15).

(4) The petitioner's omission to state in his petition the names of the persons alleged to be unduly influenced or bribed was not fatal. The fact that the respondent had not applied for particulars before the trial indicated that the petitioner's omission was not of a fundamental nature (see para 16).

(5) Whereas ss 9(1) and 10(a) of the Act define the offence of undue influence and bribery respectively, it is s 11(1)(b) of the Act which makes those two offences a corrupt practice. Even though a person is not prosecuted and convicted of corrupt practice, it is sufficient under s 11(1)(b) for a person to merely commit the offence of treating, undue influence or bribery to be guilty of corrupt practice, and then under s 32 of the Act to form a ground in an election petition to avoid the election. Thus, as in the instant case, where the alleged corrupt practice is the only basis or ground relied on by a petitioner to avoid an election, since it is s 11(1)(b) that makes undue influence and bribery a corrupt practice, the petitioner's failure to plead s 11(1)(b) would render the charges defective and incomplete. In the instant case, the petitioner had failed to relate the complaints with the provisions of the election laws the respondent was alleged to have transgressed. This rendered the election petition so fundamentally defective that it ought to be dismissed on this ground alone. *Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor* [1988] 2 MLJ 384 (referred) (see paras 17 & 25).

(6) In order to prove a charge of undue influence, it must be shown that the undue influence was exercised by the candidate or with his knowledge or consent, or by any agent of the candidate. Knowledge and consent is a question of fact in every case. It may be inferred from the act and conduct of the candidate or from other facts or circumstances established in the case. In the instant case, the uncontroverted fact was that Mr Smith's article appeared in the respondent's blog two (2) days before polling date. However, there was no evidence or sufficient evidence to prove that Mr Smith's article was in the respondent's blog with his knowledge or consent (see paras 32 & 47).

(7) The burden of proving that Mr Smith's article was published with the

knowledge or consent of the respondent, was on the petitioner who had proved a prima facie case of the element of knowledge. The burden of proof shifted upon the respondent, who had discharged the burden by creating a reasonable doubt on the petitioner's case respecting the question of knowledge and consent (see para 50).

(8) Mr Smith's article had no direct connection with the respondent's election on religious grounds. The respondent was neither a PAS candidate nor an UMNO candidate. The article had no connection with the Bandar Kuching constituency. There was nothing in the article to appeal for votes for the respondent on grounds of religion. There was no statement in Mr Smith's article to warrant a conclusion that there was any threat of divine displeasure or spiritual censure. There was no threat of evil consequence at all in Mr Smith's article, and no threats of injury. The petitioner had failed to prove the charge of corrupt practice of undue influence set out in the first charge of the election petition beyond reasonable doubt (see paras 66 & 67).

(9) The photo of a politician kissing a 'keris' in the pamphlet 'AFTER 50 YEARS OF INDEPENDENCE' was a mere political statement and could not be held to be an interference or attempt to interfere on the part of the respondent with the free exercise of any electoral right or intended or have the effect of creating fear in the minds of the voters in order to exercise their electoral right in favour of the respondent. The text of the statements in the pamphlet, were also in substance political statements. These political statements could not have affected the mind of the petitioner or the ordinary average Chinese non-Muslim voter in the Bandar Kuching constituency in the manner alleged. The evidence of PW3 on whom the petitioner had relied heavily to prove the second charge, was totally irrelevant concerning the contents of the pamphlet and inadmissible. Alternatively, PW3's evidence was worth very little. The petitioner had failed to prove the second charge against the respondent beyond reasonable doubt. *Sudhir Laxman Hendre v SA Dange* 17 ELR 373 (referred) (see paras 68, 69, 71 & 77).

(10) The manifesto the petitioner complained of ('Sarawak DAP manifesto') was in fact not the manifesto pleaded (DAP 2008 Election Manifesto). The petitioner could not be allowed to go beyond his pleadings to which he was bound. Without being able to rely on the evidence of the manifesto complained of, the charge of bribery could not be sustained. *Yew Wan Leong v Lai Ko Chye* [1990] 1 CLJ (Rep) 330 (followed). Further, it was clear that the witnesses alleged by the petitioner to be bribed were not induced to vote or refrain from voting by the manifesto. The Sarawak DAP manifesto was a normal election manifesto of a political party promising public action to, inter alia, better the living standards of the public at large including those whose

household income per year was less than RM6,000. The promises made in the manifesto were not ones where individual or personal advantage could be obtained. Neither was the manifesto made for the benefit of one person. The public promise was made for the benefit of all voters and not just for voters in the Bandar Kuching nor was it a promise by the respondent personally. It was clear that the manifesto belonged to all the DAP candidates contesting in Sarawak and was not a manifesto of the respondent. There was also no evidence of the element of 'bargain' between the respondent and the voters in the Bandar Kuching constituency – the element of 'bargain' being essential for the purpose of proving the corrupt practice of bribery. (*Wong Hua Seh v Ding Kuong Hiing* (Sibu High Court Election Petition 26 January 2008) (referred). Thus the third charge of bribery could not be sustained (see paras 94, 96, 115 & 116)

(11) Under the fourth charge, the petitioner complained that by publishing a pamphlet (exh P6 entitled 'CORRUPTION – OUR NO 1 ENEMY'), the respondent had committed the offence of corrupt practice of undue influence by reason whereof his election should be avoided under s 32(c) of the Act. However, to constitute a ground under s 32(c), it is an essential ingredient that the corrupt practice be committed in connection with the election, and the alleged act be committed by the candidate, or with the candidate's knowledge or consent or by the candidate's agent. In the instant case, the petitioner received the pamphlet (on 7 February 2008) well before the nomination day (on 24 February 2008). Thus, it could not be said that the act of corrupt practice was committed by the candidate or with the candidate's knowledge or consent and that it was committed in connection with the election, there being no candidate within the meaning of s 32(c) of the Act until 24 February 2008 which was nomination day. Alternatively, there was no evidence that the minds of the voters in the Bandar Kuching constituency were so influenced or over powered by what was stated in the pamphlet (exh P6) that they could not freely exercise their electoral rights. The fourth charge was thus not proved against the respondent. Under the fourth charge, the petitioner complained that by publishing a pamphlet (exh P6 entitled 'CORRUPTION – OUR NO 1 ENEMY'), the respondent had committed the offence of corrupt practice of undue influence by reason whereof his election should be avoided under s 32(c) of the Act. However, to constitute a ground under s 32(c), it is an essential ingredient that the corrupt practice be committed in connection with the election, and the alleged act be committed by the candidate, or with the candidate's knowledge or consent or by the candidate's agent. In the instant case, the petitioner received the pamphlet (on 7 February 2008) well before the nomination day (on 24 February 2008). Thus, it could

not be said that the act of corrupt practice was committed by the candidate or with the candidate's knowledge or consent and that it was committed in connection with the election, there being no candidate within the meaning of s 32(c) of the Act until 24 February 2008 which was nomination day. Alternatively, there was no evidence that the minds of the voters in the Bandar Kuching constituency were so influenced or over powered by what was stated in the pamphlet (exh P6) that they could not freely exercise their electoral rights. The fourth charge was thus not proved against the respondent (see paras 118–126).

(12) The petitioner's allegations in the fifth charge of undue influence concerned the respondent's publication of a pamphlet (exh P8) said to contain statements casting misleading imputations against the respondent's rival. However, having examined the said pamphlet and the contents therein and having considered the evidence adduced in court, the contents did not touch or concern the respondent's rival at all, neither with regard to his public and political activities, nor to his personal conduct and character. The evidence adduced by the petitioner relating to this charge was totally irrelevant to the charge pleaded in the petition and could not be acted on. Alternatively, the evidence could not support a charge of undue influence under s 9(1) of the Act. The charge was thus not proven against the respondent (see paras 130–138).

[Bahasa Malaysia summary

Pada Pilihanraya Umum 8 Mac 2008, responden mewakili Parti Tindakan Demokratik (DAP), menang kerusi Parlimen Bandar Kuching dengan majoriti 9,952 undi. Perayu, pengundi bagi kawasan pilihanraya Bandar Kuching, mempetisyen ke Mahkamah Tinggi untuk mengisytiharkan pemilihan responden batal. Pempetisyen mendakwa bahawa responden terlibat dalam amalan rasuah pengaruh tidak wajar dan sogokan untuk mendapat kemenangan. Pempetisyen mengemukakan lima pertuduhan terhadap responden dalam petisyennya. Berkaitan dengan pengaruh tidak wajar, pempetisyen mengadu bahawa untuk mempengaruhi pengundi bukan Muslim dan berbangsa Cina supaya mengundinya, responden telah menggugat kebebasan memilih pengundi untuk mengundi dengan, inter alia, mengugut mereka dengan kemudaratan fizikal atau rohani. Responden didakwa melakukan perkara sebegitu, inter alia, dengan menerbitkan atau membenarkan penerbitan, dengan pengetahuan dan persetujuannya, dalam laman sesawangnya, sepucuk surat daripada En Smith yang dikatakan mengandungi beberapa pernyataan berbaur ugutan yang dikatakan berkaitan dengan aduan pengundi-pengundi kawasan pilihanraya responden. Responden juga didakwa menggunakan pengaruh tidak wajar dengan menerbitkan atau mengakibatkan penerbitan beberapa risalah dan atau kenyataan. Berkaitan dengan dakwaan sogokan, pempetisyen menyatakan

A bahawa responden telah menjanjikan pengundi-pengundi suatu 'Bonus Malaysia sejumlah hingga RM6,000' bagi pengundi yang berpendapatan isi rumah kurang RM6,000 setahun dengan menerbit dan mengedarkannya atau menerbit dan mengedar dengan pengetahuan atau persetujuannya 'MANIFESTO PILIHANRAYA DAP 2008' yang mana janji-janji yang B didakwa itu dibuat. Responden menyatakan bahawa petisyen pemilihan tersebut cacat dan harus ditolak atas alasan-alasan berikut: (i) pertuduhan-pertuduhan yang ditetapkan dalam petisyen gagal memplid seksyen yang relevan dalam Akta Kesalahan Pilihanraya 1954 ('Akta tersebut') berkaitan dengan amalan rasuah; (ii) pertuduhan-pertuduhan tersebut gagal C menyatakan bahawa kesalahan-kesalahan tersebut 'berkaitan dengan pilihanraya tersebut'; dan (iii) pertuduhan-pertuduhan tidak menyata atau memplid nama-nama individu yang telah dipengaruhi secara tidak wajar atau disogok.

D

Diputuskan, menolak petisyen dengan kos:

(1) Dakwaan amalan rasuah adalah bersifat quasi-jenayah kerana dapatan amalan rasuah melibatkan hukuman jenayah. Beban pembuktian E adalah pada pempetisyen untuk membuktikan amalan rasuah tersebut melampaui keraguan yang munasabah, seperti dalam kes-kes jenayah. Kes *S Harcharn Singh v S Sajjan Singh & Ors* (1985) AOR 236 (diikut); *Gurdial Singh Nijar v KS Balakrishnan* [1983] 2 CLJ 75 (diikut) (lihat perenggan 9).

F

(2) Ungkapan 'amalan jahat atau tak jujur' bersamaan dengan 'amalan rasuah atau menyalahi undang-undang'. Perkataan 'amalan' diguna pakai walau terhadap perbuatan tunggal dan tidak terbatas kepada perlakuan kebiasaan yang diulang-ulang. Perbuatan tunggal yang bersifat seperti dalam seksyen tersebut memberi maksud amalan rasuah G (lihat perenggan 11).

(3) Walaupun pempetisyen tidak menyatakan dalam petisyennya bahawa kesalahan-kesalahan yang dilakukan oleh responden 'berkaitan dengan pilihanraya tersebut', pempetisyen telah menyatakan bahawa perlakuan H amalan rasuah adalah berkenaan dengan 'pilihanraya itu'. Melalui rujukan sebegitu, pempetisyen telah cukup memaklumkan kepada responden bahawa dakwaan kesalahan-kesalahan yang dilakukan berkaitan dengan pilihanraya tersebut tanpa perlu menggunakan pernyataan 'berkaitan dengan pilihanraya tersebut'. Seterusnya, I responden tidak diprejudiskan. Dalam kes yang dikemukakan terhadapnya, responden tidak dikelirukan atau diperdaya walaupun tidak menggunakan pernyataan 'berkaitan dengan pilihanraya tersebut' (lihat perenggan 15).

(4) Peninggalan pempetisyen menyatakan nama-nama orang yang didakwa terpengaruh secara tidak wajar atau disogok dalam petisyennya tidak menjejaskan kesnya. Tindakan responden tidak memohon butiran sebelum perbicaraan menunjukkan peninggalan pempetisyen tidaklah begitu penting (lihat perenggan 16).

(5) Seksyen-seksyen 9(1) dan 10(a) Akta tersebut masing-masing mentafsirkan kesalahan pengaruh tidak wajar dan sogokan, manakala s 11(1)(b) Akta tersebut menjadikan kedua-dua kesalahan tersebut sebagai suatu amalan rasuah. Walaupun seseorang itu tidak dituduh dan didapati bersalah atas kesalahan amalan rasuah, adalah mencukupi di bawah s 11(1)(b) bagi seseorang itu membelanjai orang, mempengaruh secara tidak wajar atau menyogok untuk didapati bersalah atas kesalahan amalan rasuah, dan kemudiannya di bawah s 32 Akta tersebut untuk membentuk dasar bagi suatu petisyen pilihanraya untuk pentaksahan pilihanraya. Maka, dalam kes ini, apabila dakwaan amalan rasuah merupakan satu-satunya dasar yang diguna pakai oleh pempetisyen untuk pentaksahan sesuatu pilihanraya, memandangkan s 11(1)(b) yang menjadikan pengaruh tidak wajar dan sogokan suatu amalan rasuah, kegagalan pempetisyen memplid s 11(1)(b) menjadikan pertuduhan-pertuduhan tersebut cacat dan tidak lengkap. Dalam kes ini, pempetisyen gagal mengaitkan aduan-aduan dengan peruntukan-peruntukan undang-undang pilihanraya yang mana responden telah didakwa melanggarnya. Ini menjadikan petisyen pilihanraya tersebut cacat secara fundamentalnya dan boleh ditolak atas alasan ini semata-mata. *Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor* [1988] 2 MLJ 384 (dirujuk) (lihat perenggan 17 & 25).

(6) Untuk membuktikan pertuduhan pengaruh tidak wajar, mesti ditunjukkan bahawa pengaruh tidak wajar itu dilakukan oleh calon tersebut atau dengan pengetahuan atau persetujuannya, atau oleh ejennya. Pengetahuan dan persetujuan merupakan persoalan fakta bagi setiap kes. Keduanya-dua boleh disimpulkan daripada kelakuan dan tindak-tanduk calon tersebut atau daripada fakta-fakta atau keadaan-keadaan kes ini. Dalam kes ini, fakta yang tidak dipertikaikan merupakan rencana En Smith yang diterbitkan dalam blog responden dua hari sebelum hari mengundi. Walau bagaimanapun, tiada keterangan atau keterangan mencukupi membuktikan rencana En Smith diterbitkan dalam blog responden dengan pengetahuan dan persetujuannya (lihat perenggan 32 & 47).

(7) Beban membuktikan bahawa rencana En Smith diterbitkan dengan pengetahuan atau persetujuan responden adalah pada pempetisyen yang telah membuktikan secara prima facie elemen pengetahuan. Beban pembuktian berpindah kepada responden yang telah melepaskan beban

itu dengan menimbulkan keraguan yang munasabah dalam kes pempetisyen berkaitan persoalan pengetahuan dan persetujuan (lihat perenggan 50).

(8) Rencana En Smith tidak mempunyai pertalian secara terus dengan pilihanraya responden atas sebab keagamaan. Responden bukanlah calon PAS atau UMNO. Rencana itu tidak berkaitan dengan pilihanraya Bandar Kuching. Tidak terdapat apa-apa dalam rencana tersebut yang menarik undi untuk responden atas dasar-dasar keagamaan. Tidak terdapat apa-apa kenyataan dalam rencana En Smith yang dapat menyimpulkan adanya ugutan kemurkaan tuhan atau celaan rohaniah. Tiada langsung ancaman akibat durjana dalam rencana En Smith, dan tiada ugutan untuk mengakibatkan kecederaan. Pempetisyen gagal membuktikan tuduhan amalan rasuah melalui pengaruh tidak wajar dinyatakan dalam tuduhan pertama petisyen pilihanraya melampaui keraguan yang munasabah (lihat perenggan 66 & 67).

(9) Foto menunjukkan seorang ahli politik mencium 'keris' dalam risalah 'SELEPAS 50 TAHUN KEMERDEKAAN' hanya merupakan kenyataan politik dan tidak boleh dianggap sebagai gangguan atau cubaan untuk mengganggu oleh pihak responden terhadap kebebasan melaksanakan hak-hak dalam pilihanraya atau berniat atau menimbulkan perasaan takut dalam minda pengundi agar mereka mengundi responden. Teks kenyataan di dalam risalah dalam intipatinya juga merupakan kenyataan politik. Kenyataan politik tersebut tidak memberi kesan terhadap minda pempetisyen atau pengundi berbangsa Cina dan bukan Muslim di kawasan pilihanraya Bandar Kuching seperti yang didakwa. Keterangan PW3 yang menjadi sandaran pempetisyen untuk membuktikan tuduhan kedua tidak relevan berkaitan kandungan risalah dan tidak diterima. Secara alternatifnya, keterangan PW3 agak lemah. Pempetisyen gagal membuktikan tuduhan kedua terhadap responden melampaui keraguan yang munasabah. *Sudhir Laxman Hendre v SA Dange* 17 ELR 373 (dirujuk) (lihat perenggan 68, 69, 71 & 77).

(10) Manifesto yang diadukan pempetisyen ('manifesto DAP Sarawak') bukanlah manisfesto yang dibentangkan (Manifesto Pilihanraya DAP 2008). Pempetisyen tidak dibenarkan melampaui apa yang diplidkan yang mana dia tertakluk/terikat kepada plidingnya. Oleh sebab tidak dapat mengguna pakai keterangan manisfesto yang diadukan, tuduhan rasuah tidak dapat dikekalkan. *Yew Wan Leong v Lai Ko Chye* [1990] 1 CLJ (Rep) 330 (diikut). Lebih-lebih lagi, jelas bahawa saksi-saksi yang didakwa pempetisyen telah dirasuah, tidak dipujuk untuk mengundi atau dihalang daripada mengundi oleh manifesto tersebut. Manifesto DAP Sarawak merupakan manifesto pilihanraya yang normal bagi parti

politik menjanjikan tindakan awam, inter alia, untuk menaikkan taraf hidup sesiapa yang berpendapatan isi rumah kurang daripada RM6,000. Janji-janji yang dibuat dalam manifesto bukan untuk kepentingan diri atau individu. Manisfesto itu juga bukanlah dibuat untuk kebaikan seorang sahaja. Janji kepada umum dibuat bagi manfaat semua pengundi dan bukan sahaja untuk pengundi di Bandar Kuching atau janji yang dibuat oleh responden secara peribadi. Jelas bahawa manifesto adalah kepunyaan calon-calon DAP yang bertanding di Sarawak dan bukanlah manifesto responden. Tidak terdapat bukti yang menunjukkan unsur 'tawar-menawar' antara responden dan pengundi pilihanraya Bandar Kuching — unsur 'tawar-menawar' adalah penting bagi tujuan membuktikan amalan perbuatan rasuah. (*Wong Hua Seh v Abang Mohd Porkan bin Haji Abang Budiman & Ding Kuong Hiing* (Petisyen Pilihanraya Mahkamah Tinggi Sibu 26 Januari 2008) (dirujuk)). Oleh itu tuduhan ketiga bagi sogokan rasuah tidak dapat dikekalkan (lihat perenggan 94, 96, 115 & 116).

(11) Di bawah tuduhan keempat, pempetisyen mengadu bahawa dengan menerbitkan satu risalah (eks P6 bertajuk 'RASUAH – MUSUH NO 1 KITA'), responden telah melakukan kesalahan amalan rasuah melalui pengaruh tidak wajar dan dengan sebab itu pemilihannya tak sah berikutan s 32(c) Akta tersebut. Walau bagaimanapun, untuk dijadikan alasan di bawah s 32(c), adalah penting amalan rasuah dilakukan berkaitan dengan pilihanraya dan tindakan yang didakwa dilakukan oleh calon atau dengan pengetahuan atau persetujuan calon dan oleh ejen calon. Dalam kes ini, pempetisyen menerima risalah (pada 7 Februari 2008) sebelum hari pencalonan (pada 24 Februari 2008). Oleh itu tindakan amalan rasuah tidak boleh dilakukan oleh calon atau dengan pengetahuan dan persetujuan calon dan dilakukan berhubung dengan pilihanraya, kerana tiada calon dalam maksud s 32(c) Akta tersebut sehingga 24 Februari 2008 yang mana merupakan hari pencalonan. Secara alternatifnya, tiada bukti yang menunjukkan minda pengundi-pengundi kawasan pilihanraya di Bandar Kuching dipengaruhi atau dikuasai oleh apa yang dinyatakan di dalam risalah itu (eks P6) bahawa mereka tidak dapat melaksanakan hak mengundi secara bebas. Tuduhan keempat tidak dapat dibuktikan terhadap responden (lihat perenggan 118–126).

(12) Tuduhan pempetisyen dalam tuduhan kelima mengenai pengaruh tidak wajar mengenai penerbitan risalah responden (eks P8) dikatakan mengandungi kenyataan-kenyataan yang boleh menyebabkan kekeliruan dan tohmahan terhadap lawan responden. Walau bagaimanapun, setelah memeriksa risalah dan isi kandungannya dan mempertimbangkan bukti yang dikemukakan di mahkamah, isi kandungannya tidak menyentuh atau berkaitan dengan lawan responden sama sekali, begitu juga dengan aktiviti-aktiviti umum dan

politiknya, dan perbuatan serta karakter peribadi beliau. Keterangan yang dikemukakan oleh pempetisyen berkaitan dengan tuduhan ini tidak relevan sama sekali terhadap tuduhan yang diplid dalam petisyen dan tiada sebarang tindakan dapat diambil terhadapnya. Secara alternatifnya, keterangan tersebut tidak dapat menyokong tuduhan pengaruh tidak wajar di bawah s 9(1) Akta tersebut. Tuduhan itu tidak dibuktikan ke atas responden (lihat perenggan 130–138).]

Notes

For cases on allegation of corrupt practices, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1992–2000.

For cases on allegation of corrupt and illegal practices, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1990–1991.

For cases on application for declaration that election null and void, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2006–2012.

For cases on corrupt practices, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1985–1988.

For cases on standard of burden of proof, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 588–589.

For cases on undue influence, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1985–1988.

Cases referred to

Dhartipakar v Rajir Gandhi AIR 1592 SC (not folld)

Gangadhar Maithani v Narendra Singh Bhandari 18 ELR 124 (not folld)

Gurdial Singh Nijar v KS Balakrishnan [1993] 2 CLJ 75, HC (folld)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (refd)

S Harcharn Singh v Sajjan Singh & Ors (1985) AOR 236 (folld)

Sudhir Laxman Hendre v SA Dange 17 ELR 373 (refd)

Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor [1988] 2 MLJ 384, HC (refd)

Wong Hua Seh v Abang Mohd Porkan bin Hj Abang Budiman & Ding Kuong Hiing (Sibu High Court Election Petition 26 January 2008) (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330, SC (folld)

Legislation referred to

Election Offences Act 1954 ss 4A, 7, 8, 9, 9(1), 10, 10(a) 11, 11(1)(b), 32(a), (b), (c), 36(1), 37

Election Petition Rules 1954 r 4(1)(b)

Indian Representation of People Act 1951 [India] s 123, 123(1), (2), (3)

Dato' Muhammad Shafee bin Md Abdullah (Henry Ling Kuong Meng and Frankie Tieh Kah Siang with him) (Ling & Wong) for the petitioner.

Chan Kok Keong (Chong Siew Chiang, Wong Ho Leng and Alvin Yong with him) (Chong Brothers Advocates) for the respondent.

Clement Skinner J:

[1] In the recently concluded Parliamentary elections held on 8 March 2008, two (2) candidates offered themselves for election in the constituency of Bandar Kuching (P195). They were Mr Sim Yaw Yen and Mr Chong Chieng Jen. Mr Sim represented the Sarawak United Peoples Party or SUPP which is a member of the coalition of political parties known as the Barisan Nasional or BN which forms the government in Malaysia including the State Government in Sarawak. Mr Chong Chieng Jen represented the Democratic Action Party or DAP, an opposition party in Malaysia. Mr Chong Chieng Jen was in fact offering himself for re-election as he was the Member of Parliament for Bandar Kuching constituency in the last Parliament before its dissolution.

In the event, Mr Chong Chieng Jen won the Bandar Kuching seat. He received 22,901 votes against Mr Sim's 12,949 votes. Mr Chong's majority was thus 9,952 votes.

[2] An elector in the Bandar Kuching constituency, one Mr Kho Whai Phiaw (hereafter 'the petitioner') being unhappy with that result has presented this petition to have Mr Chong Chieng Jen's election declared void. I shall hereafter refer to Mr Chong Chieng Jen as 'the respondent'.

[3] The petitioner seeks to have the respondent's election avoided on the ground that the latter had engaged in the corrupt practice of (i) undue influence and (ii) bribery, to procure his victory in the election. In all, the petitioner has levelled five (5) charges against the respondent in his petition; four (4) of which relate to the alleged use of undue influence while one (1) charge relates to the alleged bribery of voters in the constituency.

[4] It would not serve any purpose to set out here those five (5) charges. In essence the charges relating to undue influence allege that in order to induce the non-Muslim and Chinese voters in the Bandar Kuching constituency to vote for him, the respondent interfered with or attempted to interfere with the exercise by these voters of their free choice of vote by directly or indirectly threatening them with the infliction or the fear of infliction of temporal or spiritual injury, or physical damage or harm to their religious premises, or their loss of religious freedom, or economic loss, by other persons. The respondent is alleged to have done this in four (4) different ways, namely:

(1) by publishing or it being published with his knowledge and consent on his website know as 'Chong Chieng Jen's Blog', a letter from one Mr Smith — said to contain certain threatening statements which is alleged to have had the effect complained of on the voters in the

A constituency. This constitutes the first charge in the petition under para 3(1) thereof ('the first charge');

(2) by publishing or circulating with his knowledge or consent election pamphlets entitled '*After 50 Years of Independence*' which were alleged to
B contain statements calculated to have the effect complained of. This constitutes the second charge in the petition under para 3(2) thereof ('the second charge'); by publishing or it being published with knowledge or consent false statements or imputations in pamphlets or campaign material entitled '*CORRUPTION — OUR NO 1 ENEMY*'.
C This constitutes the forth charge in the petitioner under para 3(4) thereof ('the fourth charge');

(3) by publishing or it being published with his knowledge or consent statements containing misleading imputations against Mr Sim Yaw Yen
D in the pamphlet entitled '*SAY 'ENOUGH' TO SUPP. SAY 'NO' TO CM*'. This constitutes the fifth charge in the petition under para 3(5) thereof ('the fifth charge').

[5] As far as the charge relating to the corrupt practice of bribery is
E concerned, in essence the petitioner alleges that the respondent had promised to give the voters in Bandar Kuching constituency a 'Malaysia bonus of up to RM6,000' for those with household income of RM6,000 or less per annum by publishing and distributing or it being published and distributed with his knowledge or consent the '*DAP 2008 ELECTION MANIFESTO*' in which
F the alleged promise is said to be made. This constitutes the third charge in the petition under para 3(3) thereof ('the third charge').

[6] The petitioner has pleaded that what the respondent is alleged to have
G done by way of the corrupt practice of undue influence as described in the first, second, fourth and fifth charges in the petition is contrary to s 9(1) of the Election Offences Act 1954 ('the Act'). For that reason the respondent's election should be declared void under s 32(c) of the Act.

H **[7]** As far as the third charge in the petition is concerned, the petitioner has pleaded that the alleged corrupt practice of bribery is contrary to s 10(a) of the Act. For that reason the respondent's election should be declared void under s 32(c) of the Act.

I THE LAW

[8] At the outset, I accept the following propositions of law in relation to an election petition which is brought to avoid an election on the ground of corrupt practice.

[9] There seems to be a divergence of views in Malaysia on the burden of proof in proving the commission of a corrupt practice ie whether the court should require proof beyond a reasonable doubt as in criminal cases, or, on a balance of probabilities as in civil cases. The more widely accepted view, with which I respectfully concur, is that since an allegation of corrupt practice is of a quasi — criminal natural as a finding of corrupt practice entails penal consequences, the onus is on the petitioner to prove corrupt practice by proof beyond reasonable doubt as in criminal cases. See *Gurdial Singh Nijar v KS Balakrishnan* [1993] 2 CLJ 75. But in requiring proof beyond reasonable doubt, I remind myself of what was stated in *S Harcharn Singh v Sajjan Singh & Ors* [1985] AOR 236 that:

> While insisting on standard of strict proof, the court should not extend or stretch this doctrine to such an extent as to make it well nigh impossible to prove an allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act maintaining purity of the electoral process.

[10] I also accept the proposition that even though the respondent won by a majority of 9,952 votes, that would not prevent the present election petition nullifying the result on any ground of corrupt practice under s 32(c) of the Act which states:

> 32 Avoidance of election on election petition
>
> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> (a) ...
>
> (b) ...
>
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by an agent of the candidate;
>
> (d) ...
>
> (e) ...

[11] R N Choudry in his commentary on the Representation of People Act 1951, (1st Ed) Orient Publishing Company at p 251 explained the words 'corrupt practice' appearing in s 123 of the Indian Act this way:

> The expression 'corrupt or illegal practice' is equivalent to 'corrupt practice or illegal practice'. The word 'practice' applies even to a single act and is not confined to habitual repetition of the action. A single act of the nature given in that section would be a corrupt practice.

[12] Although the learned author was there referring to s 123 of the Indian Representation of People Act 1951, it is my view that the explanation given there will apply to the same words which are found in s 32(c) of our Act as s 32(c) does not contain words of qualification such as, for instance, that the alleged corrupt practice had 'so extensively prevailed that they may be reasonably supposed to have affected the result of the election' or even that such corrupt practice had 'affected the result of the election', which words are found in s 32(a) and s 32(b) but not sub-s (c).

IS THE ELECTION PETITION DEFECTIVE?

[13] In his closing submissions, Mr Chan Kok Keong of counsel for the respondent contended that the election petition ought to be dismissed as it is defective. According to counsel the defect was such that there is no valid election petition before the court. Counsel gave three (3) reasons for his contention:

(a) all the charges specified in para 3(1), 3(2), 3(3), 3(4) and 3(5) of the election petition are incomplete as they fail to plead the requisite section of the Act relating to the offence of corrupt practice ie s 11(1)(b) of the Act;

(b) all the charges are also incomplete as they failed to allege and state that the alleged offences committed were 'in connection with the election' which is also an essential ingredient of the offence of corrupt practice under s 32(c) of the Act;

(c) all the charges are also defective because they failed to allege or plead the names of the persons alleged to have been unduly influenced or bribed.

[14] I will address each of these grounds in turn although not in the order in which they were raised.

[15] With regard to ground (b) above, ie that the petitioner did not state in his petition that the offences allegedly committed by the respondent were 'in connection with the election', I do not find any merit in this complaint. Although the petitioner had failed to use these precise words, I do not think it was fatal to his petition as the petitioner has used words to the like effect in his petition. The petitioner has in the earlier paragraphs of his petition stated the fact that elections were held in the Parliamentary Constituency of P195 Bandar Kuching on 8 March 2008. In the charges the petitioner stated that the acts of corrupt practice were in relation to 'the said election'. By such references, the petitioner has sufficiently indicated to the respondent that the alleged offences committed were in connection with the election without having to use those precise words. I do not think any prejudice was caused to

the respondent. He could not have been confused or misled as to the case he had to meet even though those precise words were not used.

[16] With regard to (c) above, ie the names of the persons alleged to be unduly influenced or bribed were not stated in the petition, I do not think this omission was fatal to the petition. If the respondent was in any way prejudiced by the failure to state such names, he could have applied for particulars before the trial. The fact that he did not do so indicates that the petitioner's omission was not of a fundamental nature.

[17] With regard to ground (a) above, the respondent contends that under s 32(c) of the Act, a corrupt practice if committed in connection with the election by a candidate or with his knowledge or consent, or by his agent is a ground for avoiding an election by way of an election petition. But what is a 'corrupt practice' for the purpose of the Act? The answer is found in Part III of the Act where certain acts are defined and categorised as 'corrupt practices'. Thus, s 7 which defines the offence of personation, s 8 which defines the offence of treating, s 9 which defines the offence of undue influence and s 10 which defines the offence of bribery have all been categorised as 'corrupt practices'.

[18] Counsel for the respondent contends that while s 9(1) and s 10(a) of the Act defines the offence of undue influence and bribery respectively, it is s 11(1)(b) of the Act which makes undue influence and bribery the offence of corrupt practice. Therefore to constitute a complete cause of action of the ground of corrupt practice in this case, the petitioner must plead the requisite sections, namely, s 9(1) or s 10(a) *and* s 11(1)(b) *and* s 32(c) since they are the relevant sections which define the particular type of corrupt practice complained of, makes the particular offence a corrupt practice, and which allows for the avoidance of the election on that ground. Since the petitioner did not do so the respondent contends that all the charges in the petition have been rendered incomplete and defective and so the election petition should be dismissed for failing to comply with the strict requirements of r 4(1)(b) of the Election Petition Rules 1954 which requires an election petition to 'briefly state the facts and grounds relied on to sustain the prayer'.

[19] Dato' Muhammad Shafee bin Md Abdullah of counsel for the petitioner denies that the election petition is defective as alleged. He contends that s 11 of the Act is totally irrelevant in an election petition because s 11 would only apply if there has been a prosecution instituted under the section and a conviction obtained. Learned counsel contends that a reading of s 11 shows that that section only becomes relevant if a person has been convicted by a sessions court of a corrupt practice in which event, the very serious consequences stated in the section will flow.

[20] I do not agree with Dato' Shafee Abdullah. I find that counsel for the respondent is correct in the position he has taken on s 11. I say so for the following reasons.

[21] It is central to the reasoning of the respondent that while s 9(1) and s 10(a) define the offence of undue influence and bribery respectively, it is s 11(1)(b) that makes those two (2) offences an offence of corrupt practice. To determine the correctness of this argument it will be helpful to see what these three (3) sections say in their relevant parts.

[22] Section 9 reads:

> Undue Influence
>
> Every person who before, during or after an election directly or indirectly by himself or by any other person on his behalf, ... inflicts or threatens to inflict by himself or by any other person, any temporal or spiritual injury, damages, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting... or prevents the free exercise of the franchise of any elector or vote ... or who directly or indirectly interferes or attempts to interfere with the free exercise by any person of any electoral right *shall be guilty of the offence of undue influence* (Emphasis added.)

[23] Section 10 reads:

> Bribery
>
> The following persons *shall be deemed guilty of the offence of bribery*:
>
> (a) every person who before, during or after the election, directly or indirectly by himself or by any other person on his behalf, gives, lends, or agrees to give or lend or offers, promises or premises to procure ... any money or valuable consideration to or for any elector or voter ... (Emphasis added.)
>
> (b) ...;
>
> (c) ...;
>
> (d) ...;
>
> (e) ...;
>
> (f) ...;
>
> (g) ...;
>
> (h) ...;
>
> (i) ...

[24] It will be immediately noticed that whilst these sections ie s 9(1) and s 10(a) define the offence of undue influence and bribery (and the same is also true of s 7 and s 8 which define the offence of personating and treating respectively) which are categorised as 'corrupt practices' under the heading found in Part III of the Act, there is nothing stated in these sections which constitutes or makes them an *offence of corrupt practice*. For that, one has to read s 11 of the Act which states in its relevant parts:

> Punishment and incapacities for corrupt practice
>
> (1) Every person who —
>
> (a) ...;
>
> (b) commits the offence of treating, undue influence or bribery;
>
> (c) ...;
>
> (d) ...;
>
> (e) ...;
>
> (f) ...;
>
> *Shall be guilty of a corrupt practice*, and shall, on conviction by a Sessions Court, be liable in the case referred to in para (a) and (b), to imprisonment for a term not exceeding two (2) years and to a fine of not less than one thousand ringgit and not more than five thousand ringgit, and, in any other case, to imprisonment for a term not exceeding one (1) year and to a fine not exceeding two thousand ringgit; and offences under paragraphs (a) and (b) shall be seizable offences within the meaning of the Criminal Procedure Code, (Emphasis added.)
>
> (2) ...;
>
> (3) ...;

[25] Now, while it is true as Dato' Shafee Abdullah has said that s 11 comes into play when there has been a conviction for a corrupt practice, it does not follow that that is the only occasion when the section comes into play. It is important to note that it is s 11(1)(b) that makes the offence of treating, undue influence or bribery a corrupt practice. It is equally important to note that even though a person is not prosecuted and convicted of a corrupt practice under the section, s 11(1)(b) states that every person who merely commits (as opposed to being convicted of) the offence of treating, undue influence or bribery shall be guilty of a corrupt practice. And a reading of s 32 of the Act shows that on that basis an election petition can be presented to avoid the election under s 32(c). It is for this reason that I do not agree with Dato' Shafee Abdullah that s 11 is irrelevant to an election petition. On the

A contrary, in a case such as this, where the alleged corrupt practice is the only basis or ground relied on by the petitioner to avoid the election, since it is s 11(1)(b) that makes undue influence and bribery a corrupt practice, upon which ground the respondent's election may be avoided, the petitioner's failure to plead s 11(1)(b) renders the charges defective and incomplete. The B petitioner has failed to relate the complaints with the provisions of the election laws the respondent is alleged to have transgressed (see *Wan Daud bin Wan Jusoh v Mohd bin Haji Ali & Anor* [1988] 2 MLJ 384). This has rendered the election petition so fundamentally defective that it should be dismissed on this ground alone. In case I am wrong in what I say, I now go C on to consider the charges.

THE FIRST CHARGE

D **[26]** The complaint of the petitioner here is that the respondent had exercised undue influence over the non-Muslim voters in the Bandar Kuching constituency through an article appearing or posted on his website allegedly written by one Mr Smith (Mr Smith's article).

E **[27]** In support of this charge the petitioner adduced evidence through several witnesses. Kho Whai Phiaw (PW1) the petitioner himself testified in his evidence in chief that the first time he read Mr Smith's article on the respondent's blog was on or about 26 or 27 February 2008 which he downloaded with the help of his son. He said the article was on the internet before 6 March 2008. It was his evidence that as a Christian, the offending F part of the Mr Smith's article which I shall refer to shortly, had made him feel angry. He felt that his dignity had been discredited. PW1 was specifically referred to exh P 3(14) ie p 27 of the petitioner's bundle of documents ('PBD') at which is found those parts of Mr Smith's article which PW1 found offensive. What is found at p 27 of the PBD is also pleaded in para 3(1)(b) G of his petition.

[28] That part of Mr Smith's article which is being complained of reads as follows:

H > As Christians, should we be more concerned about Truth, Freedom, Justice, good governance, honesty and righteousness than bread and butter issues or clogged drains and tarred roads?
>
> Shouldn't a Christian stand up for the poor, the oppressed and marginalised? (Please read Mathew 6).

I > UMNO has done more damage to my religious rights than PAS. It is UMNO which is snatching away dead bodies, not PAS. It is UMNO which is separating children from parents and husbands from wives, not PAS. It is UMNO which demolishes Hindu temples, not PAS. It is UMNO which destroys Christian Orang Asli churches, not PAS. So which political party has become more Islamic?

> Therefore, it is not 'naive or emotional' for a Christian to give his/her note to PAS against the apartheid inclined regime that is racist and utterly devoid of honesty and morality.
>
> The government has to earn that Christian vote. It is not given free of charge. Sir, there is such a thing as a protect vote. A friend of mine is so enraged with the current deplorable state of affairs that apart from PAS, he is even prepared to vote for a dog if the opposition puts it up as candidate for Parliament.

[29] After being referred to the above part of Mr Smith's article, PW1 said in his evidence in chief that it refers to Christians in general, and that as a Christian 'they treated us like a dog'. 'Even worse than a dog'. When PW1 was referred to the fifth paragraph of the above article and it was translated to him into Mandarin at his request, he said in his evidence in chief that after he read this passage 'I felt that this is a damage to the Christian because they take a dog to compare the Christian and our dignity has also been down graded'.

[30] In his cross-examination PW1 said that it was that part of Mr Smith's article which is reproduced above, that the respondent, had used to exercise undue influence over the voters in the Bandar Kuching constituency by either threatening them with the infliction of temporal or spiritual injury or physical damage to religious premises, or loss of religious freedom so as to induce the voters to vote for him, or to interfere with the free exercise of their electoral rights, or that he had attempted to do so.

[31] As regards the offence of undue influence itself, a useful illustration of an essential element of this offence is given by Justice GSL Srivastava, in *Law of Indian Elections and Election Petitions*, Eastern Book Company at p 351, where he discusses undue influence within s 123(2) of the Indian Representation of People Act 1951, where he said:

> To constitute 'undue influence' within s 123(2) of the Act, it is not necessary that there should be any actual threat or physical compulsion, but the method of inducement adopted should convey to the mind of the person addressed that not-compliance with the wishes of the person offering the inducement may result in physical or spiritual harm to himself or to any other person in whom he is interested. Some fear of harm resulting from non-compliance with the request in thus an essential element of undue influence. To constitute undue influence it is not necessary that there should be any physical compulsion; methods of inducement which are so powerful as to leave no free will to the voters in the exercise of his choice may amount to undue influence.

[32] A reading of s 9 and s 32(c) of our Act also shows that in order to prove a charge of undue influence to the satisfaction of the election judge, it

must be shown that the undue influence was exercised by the candidate or with his knowledge or consent, or by any agent of the candidate.

[33] In my judgment the issues that arise for determination under the first charge are:

(a) Was Mr Smith's article published by the respondent or with his knowledge or consent, or by his agent? (the first issue);

(b) Whether the impugned part of Mr Smith's article had the effect of directly or indirectly inflicting on the voters in the Bandar Kuching constituency some fear that they would suffer the various types of harm complained of in the first charge, or of interfering with their electoral rights, (the second issue).

[34] I will address each of these issues in turn.

THE FIRST ISSUE

[35] On this first issue there is no controversy or dispute between the parties that the respondent is the owner of the website styled 'Chong Chieng Jen's Blog' and that Mr Smith's article was posted on that website which was accessible to visitors before, during and after the recently concluded Parliamentary election held on 8 March 2008. The question is, was Mr Smith's article published by the respondent or with his knowledge or consent? Since, it was never pleaded by the petitioner that whoever published that article on the website had done so as the respondent's agent, that question does not arise for determination.

[36] It is the petitioner's case that an irresistible inference must be drawn that Mr Smith's article was published by the respondent or with his knowledge or consent for the following reasons.

[37] It was PW1's evidence that he had read and downloaded Mr Smith's article from the respondent's website. As far as control over that website is concerned, the petitioner relies on the evidence of PW9 Johari bin Abdullah who graduated from University Putra Malaysia in 2000 with an honours degree in computer science, specialising in networking. He has also obtained his Masters in Information Technology in 2003 from the Queensland University of Technology, specialising in data communications which is similar to networking. PW9 presently lectures in the faculty of computer science and information technology at University Malaysia Sarawak (UNIMAS).

[38] It was PW9's evidence that there are several ways available to control information in a blog site. One way is by limiting the type of visitor who can post comments in response to any of the postings available on the blog site. Another way is for the blog owner/administrator to moderate the comments by activating or enabling the comments moderation option on the settings page. By this method, if any visitor visits the blog site and decides to post a comment in response to any of the postings, the owner/administrator can review the comments posted by the visitor/user before the comment is published for public viewing. If the owner/administrator feel that the contents are not suitable for viewing, he or she can reject the comments whereafter it is not visible to any visitor/user.

[39] According to PW9, yet another way to control information is by hiding or deleting any posted comments on the blog site. Only the administrator who is usually the owner of the blog site has the ability to perform such activities or if the administrator has given the right to other team members, those team members can perform the same activities ie of hiding and deleting.

[40] Yet another way of control according to PW9, is for the administrator/owner of the blog to review any available postings on the blog site to select them for editing by clicking the 'edit' icon to edit/delete any text, graphics, object or edit in terms of colour or size of font and so on.

[41] PW9 also testified that by accessing the profile page of a website, it is possible to verify whether the owner/administrator of the blog site has appointed any other user as a team member in terms of adding comments and blogging activities like hiding, deleting and so on. According to PW9, when he accessed the profile page of 'Chong Chieng Jen's Blog' sometime after the 8 March 2008 election, he found there were no other team members 'being assigned' and only the name of the owner appears. According to PW9, this 'clearly indicates that there are no other users that have access to the blog site with the ability to add postings and other related blogging activities such as hiding, deleting and so on'. PW9 further testified in his re-examination that it is possible for the owner of a blog site to be notified of any new comments on his website by enabling the e-mail notification option in the settings page.

[42] Based on the above evidence, it was the submission of counsel for the petitioner that the respondent had absolute control over his blog and that as owner of the blog, the respondent could control all the information, including hiding, editing and deleting postings on his blog, limiting the type of visitors who could add postings or comments on his blog and moderate those comments, or by enabling the e-mail notification option or by

A manually visiting the blog site and viewing the comments the respondent could exercise such control. Therefore, according to the petitioner, the respondent as the owner of the blog becomes the publisher of all articles and postings on his website even if they are written by different individuals, as the act of publication could not have taken place without his consent or
B knowledge. I do not agree.

[43] In my judgment, the evidence relied on by the petitioner especially that of PW9 is equivocal. It is capable of giving rise to more than one inference. The irresistible inference which the petitioner wants the court to
C draw is not the only reasonable inference which can be drawn from his evidence. I say so for the following reasons.

[44] Although the petitioner contends that the respondent was the
D publisher of Mr Smith's article or that it must be inferred that he published it, the facts show otherwise. It is clear to me from looking at that page of the respondent's blog which was produced in court that the person who posted Mr Smith's letter to the respondent's blog on 6 March 2008 at 2.30pm was one 'responsible Christian voter' ('RCV'). Mr Smith was the author of the
E letter and it was RCV who published that letter through the respondent's blog site, and not the respondent as alleged. On the evidence before me, there is nothing to suggest or from which it can be reasonably inferred that the respondent had any sort of relationship with either RCV or Smith. They are strangers to the respondent. I agree with counsel for the respondent that there
F is no evidence that Smith's comment was made in the interest of the respondent who is not even a Christian or in the promotion of the respondent's election only. And as I indicated earlier, it was not even alleged that RCV or Smith are agents of the respondent. Accordingly, I find that the respondent had not published Mr Smith's article as alleged.

G

[45] With regard to the petitioner's contention that it must be inferred that Mr Smith's article was in the respondent's blog with his knowledge or consent, the relevant period of knowledge must be from the date of the posting ie 6 March 2008 to the date of polling ie 8 March 2008. Knowledge
H after the polling date is not relevant for the purpose of determining the knowledge or consent of the candidate in this case.

[46] A relevant question connected to this issue is whose duty is it to establish the element of knowledge? The general law is that the burden of
I proof as to any particular fact lies on that person who wishes the court to believe in its existence. Accordingly in this election petition, the burden of proving that Mr Smith's article was published with the knowledge or consent of the successful candidate ie the respondent, is on the petitioner who wishes the court to believe in its existence.

[47] Knowledge and consent is a question of fact in every case. It may be inferred from the act and conduct of the respondent or from other facts or circumstances established in the case. In the instant case, the uncontroverted fact is that Mr Smith's article appeared in the respondent's blog two (2) days before polling date. Did the respondent know that Mr Smith's article had been posted to his blog and did he consent to it being there? The petitioner wishes it to be inferred by the court that the respondent must have had 'knowledge' and 'consented' to the article based on what PW9 had testified on regarding the control which a blog owner exercises over his website. In my judgment the evidence of PW9 shows that in theory it would be possible for the owner of a blog to exercise control over what appears on his website through the various control mechanisms mentioned by PW9, but there is no evidence before me to show or from which it can be reasonably inferred that between 6 March 2008 (when Mr Smith's article was posted) and the date of polling ie 8 March 2008, the respondent did have in place any of the control mechanism mentioned and was exercising control over his blogs by any of the methods referred to by PW9 ie by limiting the type of visitors to his blog, by having a comments moderation option which was activated or enabled or by hiding or deleting, or that an 'edit' mechanism was in operation or that an e-mail notification option was in operation and activated. In fact PW9's evidence was that he visited the respondent's website sometime well after the polling date. As such he would not be in a position to tell whether any of the control mechanisms which he referred to were available to the respondent at the relevant time and or whether the respondent had used any of them so that the court can infer such 'knowledge' and 'consent' to Mr Smith's article being on the respondent's blog.

[48] The petitioner has placed great emphasis on PW9's testimony that when he visited the respondent's website and accessed the profile page, he found no other team members had been assigned to perform control activities over the respondent's blog site which indicated to PW9 that there were no other users apart from the respondent who had the ability to add postings and perform other control related activities to the respondent's blog site. Therefore, it was submitted that it must be inferred that the respondent knew or had consented to Mr Smith's article. I do not agree. What PW9's evidence amounted to at its best was that there was a possibility that the respondent could have knowledge of Mr Smith's article in his blog, but mere speculation is not fact. Further, it was demonstrated during this very trial that PW9's testimony about his visit to the respondent's website and about him finding that the respondent was the only user with the ability to add postings or perform other related blogging activities could be of very little evidential value to the petitioner's case because it will be recalled that during the trial, while PW9 was giving his evidence he demonstrated to the court that it was possible for him to post a comment on the respondent's blog as a comment without any knowledge or consent of the respondent.

A **[49]** Accordingly, I find that there is no evidence or sufficient evidence adduced to prove that Mr Smith's article was in the respondent's blog with his knowledge or consent.

B **[50]** If I am wrong in what I say and it is to be held that the petitioner has proved a prima facie case of the element of knowledge and that the burden of proof has shifted upon the respondent, I am satisfied that the respondent has discharged the burden by creating a reasonable doubt on the petitioner's case respecting the question of knowledge and consent.

C **[51]** The evidence shows that Mr Smith's article was posted on 6 March 2008 at 2.30pm and polling day was on 8 March 2008. So, if the respondent was to have knowledge of the article it would have to be between those two or three days. But the respondent testified that between those two or three days he was so busy canvassing door to door, and preparing and making
D speeches at *Ceramahs* that he had no time to visit his blog. I accept the evidence of the respondent on this point. What he says is not inherently improbable. What the respondent said has to be viewed in the light of the fact that it is common knowledge that during every general election, the last few days are the busiest and crucial moments of the election, a fortiorari in
E Malaysia where the campaign period is by law very short. A candidate would really have to work day and night to be elected. I accept the respondent's evidence that he had not visited his blog between 6 March 2008 and 8 March 2008 and was therefore unaware of Mr Smith's article between those dates.

F **[52]** In arriving at the above finding I have not overlooked the petitioner's submission to the effect that after the respondent had became aware of Mr Smith's article after the elections were over, he did nothing to remove it from his website which shows that he did not object to it and therefore it must be inferred that he was aware of the article before polling day. The short
G answer to this submission is that, as I indicated earlier, the relevant period of knowledge for the purposes of this case is 6 March 2008 to 8 March 2008 and knowledge after the polling date is irrelevant for the purpose of determining the state of the respondent's knowledge during the relevant time.

H **[53]** Further, eventhough the respondent said that he had an assistant one Alexander Goh Leng Kung to monitor his blog, there is no evidence that this assistant had notified or alerted the respondent of Mr Smith's article.

I THE SECOND ISSUE — DID MR SMITH'S ARTICLE INFLICT ON THE VOTERS SOME FEAR OF HARM OR INTERFERE WITH THAT ELECTORAL RIGHTS?

[54] On this issue the petitioner relied on the evidence of several witnesses

to show what effect Mr Smith's article had on them. The petitioner alleges that the respondent had used sensitive racial and religious issues in Mr Smith's article to influence and appeal to the Chinese voters in the Bandar Kuching constituency to vote for him. The witnesses which the petitioner relied on for this part of his case were himself (PW1), Dato' Yaacob bin Mohamad (PW10), Dato' Wong Chen Wai (PW12) and Jublin anak Derai @ Dri (PW14).

[55] I will address the petitioner's allegation regarding Mr Smith's article raising sensitive issues shortly. Let me deal first with the evidence of the witnesses who read Mr Smith's article.

[56] The complaint in the petition is that the contents of Mr Smith's article had unduly influenced the voters in Bandar Kuching constituency. Therefore, the effect which Mr Smith's article had upon the minds and feelings of the ordinary average non-Muslim voter in the Bandar Kuching constituency is what matters and is relevant to the court. In this regard, I wish to briefly deal with the evidence of PW10, PW12 and PW14.

[57] The evidence shows that PW10 who is the Executive Secretary of Barisan Nasional, testified that the allegations in Mr Smith's article are false and that in his opinion the article would influence the voters in the country 'as well as Kuching'. I find PW10's opinion irrelevant and inadmissible. PW10 resides in Bukit Damansara Kuala Lumpur and he is not a voter in the Bandar Kuching constituency. He is not representative of the ordinary average non-Muslim voter in the Bandar Kuching constituency neither is he an expert to have expressed the opinion which he did. Besides, it is on record why counsel for the petitioner called PW10. The record reads: 'The reason this witness is brought to testify is not to give his views on the effect the article has on the electorate in Kuching but to in fact comment on whether UMNO is involved in all these allegations.'

[58] PW12 is the editor of the Star Newspaper. He testified that he thought Mr Smith's article would influence the minds of the voters and that there would be a certain sense of anger against Barisan Nasional. But PW12 does not live in the Bandar Kuching constituency and is not representative of the ordinary average non-Muslim voter there. PW12 lives at Petaling Jaya, Selangor and neither is he a voter in the Bandar Kuching constituency. His view about the influence of Mr Smith's article is opinion evidence and inadmissible.

[59] PW14 may be a non-Muslim and he testified that after reading that part of Mr Smith's article which is the subject of the first charge in the petition, he felt that the government of the day is really bad, but PW14 is not

a voter in the Bandar Kuching constituency. He voted in the Stampin constituency. Accordingly his evidence is irrelevant to this charge as he is not representative of the ordinary average non-Muslim voter in the Bandar Kuching constituency. Further, I attach very little weight to what PW14 said as he was obviously an interested witness in that he is a committee member of a SUPP Branch, a member of the BN. I also agree with counsel of the appellant that there is no evidence in PW14's testimony that the article influenced anyone. PW14 admitted in his cross-examination that he did not talk to Church elders or leaders or the congregation about the article. If PW14's allegation is true, then it could be expected that the BN candidate in the Stampin constituency would have been defeated by the DAP candidate there, but that was not the case. In fact the BN candidate won the Stampin seat with a big majority of over 3,000 votes.

[60] This leaves us with only the evidence of PW1 regarding the effect which Mr Smith's article allegedly had on the non-Muslim voters in Bandar Kuching constituency. I have already set out in an earlier part of this judgment the extent of PW1's evidence relating to the first charge.

[61] PW1 said he had read Mr Smith's article on the respondent's website before polling day and was influenced by it. In my judgment for the article to have had an effect on PW1, he must first have see it and secondly understand what it says. I find he neither read the article before polling day or if he did, he did not understand it. My reasons are these. PW1 said the first time he read Mr Smith's article on the respondent's blog was on 26 or 27 February 2008. He further said the article was on the internet *before* 6 March 2008 but the evidence shows that Mr Smith's article was not posted to the website until 6 March 2008 at 2.30pm. So, on PW1's own evidence it was impossible for him to have read Mr Smith's article on the respondent's blog when it was not even posted there yet on those dates he mentioned.

[62] Even assuming for the sake of argument that PW1 had read Mr Smith's article, the question arises, did he understand it. I find that he clearly did not do so. He expressed anger at the impugned article as he felt that Christians had been compared to dogs, but nowhere in the article is such a comparison made. This truly exposed the extent of PWl's failure to truly comprehend the impugned article. I find that the cross-examination of PW1 on his understanding of the text of Mr Smith's article showed that he had difficulty in understanding and comprehending it. Accordingly, I find what PW1 said about the article creating fear and anger in him and insulting him as a Christian thereby interfering with his free exercise of electoral right is absolutely ridiculous and far fetched. I disbelieve his evidence on this point. In this regard counsel for the petitioner submitted that the court should not expect the level of understanding of the ordinary average voter in Bandar

Kuching constituency to be that of an intellectual or even to understand the precise grammatical meanings of words used in articles. I agree. It is not by those standards which I have assessed PW1's understanding of Mr Smith's article.

[63] The final question to ask on this second issue is whether that impugned part of Mr Smith's article contained 'such threatening statements' as alleged in the petition or as his counsel put it in his submissions, 'created fear and terror in the mind of voters in Bandar Kuching', so much so that in the 'Chinese dominated constituency of Bandar Kuching, the voters judgment, discretion or wishes were easily overborne by the influence in the impugned article'?

[64] The petitioner has tried his utmost to portray Mr Smith's article as an appeal to the non-Muslim voters in the Bandar Kuching constituency on the ground of religion and an attempt to create in them a feeling of fear, hatred and terror of UMNO so as to induce the voters to vote for the respondent, by playing on the sensitive issue of religion. I do not agree. In the first place, nowhere in the impugned part of Mr Smith's article did it call upon voters to vote for the respondent whether on religious grounds or otherwise, or refrain from voting for Sim Yaw Yen. In the second place, there is no evidence that Mr Smith is a religious leader and the respondent is not a Christian. The article clearly did not call upon Christians to vote for a Christian either. In the third place, there is no evidence that Mr Smith or the respondent had any religious influence over the Christian voters in Bandar Kuching. In fact it is difficult to see how a Buddhist like the respondent could have any influence over Christian voters in Bandar Kuching on the ground of religion. There is also no evidence that Mr Smith is known to the voters in Bandar Kuching, Christians or otherwise, or that he had any disciple in Kuching. As such Mr Smith could not have any influence at all over Christian voters in Bandar Kuching. In the fourth place, the text of Mr Smith's article when looked at dispassionately does not show it to be a play on religious sensitivities as alleged.

[65] I agree with counsel for the respondent that paras 1 and 2 of the impugned part of Mr Smith's article are questions, searching for opinions. Paragraph 3 is a criticism against a political party in general ie UMNO for its religious policy and a comparison is made between PAS and UMNO as to which political party is more Islamic. Paragraph 4 is clearly a statement of opinion, as to which of the two parties UMNO or PAS is more deserving of Christian votes. Paragraph 5 is again an expression of opinion, as to how the government has to earn the Christians' vote.

A **[66]** So, it can be seen that the article has no direct connection with the respondent's election on religious grounds. The respondent is neither a PAS candidate nor an UMNO candidate. The article has no connection with the Bandar Kuching constituency. There is nothing in the article to appeal for votes for the respondent on grounds of religion, neither an appeal that
B Christian must vote Christian or anything of that sort. There is no statement in Mr Smith's article to warrant a conclusion that there was any threat of divine displeasure or spiritual censure. There was no threat of evil consequence at all in Mr Smith's article, and no threats of injury too.

C **[67]** For all the above reasons, I find that the petitioner has failed to prove the charge of corrupt practice of undue influence set out in the first charge of the election petition beyond reasonable doubt.

THE SECOND CHARGE

D

[68] Under this charge the petitioner raises the same complaints against the respondent as in the first charge except that in this charge the respondent is alleged to have used a pamphlet entitled 'AFTER 50 YEARS OF INDEPENDENCE ...' to exert the undue influence complained of in the
E charge on the Chinese and non-Muslim voters in the Bandar Kuching constituency. The pamphlet was produced in evidence through different witnesses and marked as exh P4, exh P12 and exh P30 respectively but they all refer to the same pamphlet. The pamphlet contained statements as well as
F a photograph of or politician holding a 'Keris'. This photograph was identified during the trial to be that of Datuk Seri Hishamuddin. It is the case of the petitioner that the respondent, knowing that the majority of voters in the Bandar Kuching constituency were Chinese, had used what was stated in the pamphlet to 'stoke sensitive racial and religious sentiments in Malaysia to
G gain the support of the Chinese voters in the said constituency and to rile and affect the emotions of the Chinese and non-Muslim voters in the constituency' so that they would vote in favour of DAP. The statements found in the pamphlet were that:

> H BN is now getting extreme, Maza Goddess Statute is not allowed to be erected in Sabah, Indian temples are torn down by Councils and declaration that Malaysia is an Islamic State.
>
> The racially discriminatory NEP is getting worse. Race because the main consideration for government procurement and now GLC are following suit. This is despite the findings that Bumi's equity participation has surpassed the 30% and
> I has even reached the 45% mark.
>
> Chinese schools are not getting their share of government fund. There is still severe shortage of teachers for Chinese schools. Many top Chinese students are not given scholarships and many are not even offered the course of their first choice in local universities.

Taib has ruled Sarawak for 26 years. His family's business has flourished since he took office. His son is now joining politics. It looks like the Taib Empire will continue for years to come.

For those convent schools St Mary's statute must be removed, the crosses must be destroyed and the influence of the churches must be stopped The extremist statement by BN MP in Parliament.

SUPP can only say 'Yes'. Vote DAP, Stop BN's racial Discrimination.

VOTE DAP Chong Chien Jen P 195 Bandar Kuching.

[69] The real issue here is whether the ordinary average Chinese and non-Muslim voters in the Bandar Kuching constituency were so stoked and riled up by what was stated in the pamphlet that they were unduly influenced to vote for the DAP? I do not find it to have been proved so. I say so for the following reasons.

[70] To prove this charge, the petitioner called several witnesses. They were the petitioner himself (PW1), Madam Wong Choon Tee @ Ong Choon Ming (PW3), Dato' Yaakob Bin Mohammad (PW10), Dato Wong Chun Wai (PW12) and Jublin AK Derain @ Dri (PW14).

[71] Of the above witnesses, only PW1 and PW3 were Chinese non-Muslim voters in the Bandar Kuching constituency. The others were not and there was no evidence led before me that either PW10, PW12 or PW14 were experts who were able to give any opinions on the effects which the contents of the pamphlet may have had on the minds of the ordinary average Chinese non-Muslim voter in Bandar Kuching constituency. Their evidence about such effect must be ignored.

[72] Turning now to the evidence of PW1, was his mind so affected by the contents of the pamphlet 'that his free will or judgment had been overpowered' as claimed by counsel for the petitioner? As far as the photo of the politician holding a 'Keris' is concerned, PW1 said this was his main complaint about the pamphlet as the UMNO leader was holding the 'Keris' in a threatening manner to other races and it signified a challenge to the Chinese community. According to PW1, it made all the Chinese feel uncomfortable to the extent they voted for the opposition.

[73] Is PW1 to be believed in what he says? I do not think so for the following reasons.

[74] The photo was not accompanied by any captions or words but just stood by itself at a top corner of the pamphlet. How could such a photo create the type of fear as alleged? The 'Keris' shown is. not even unsheathed,

A and, was being held and not 'wielded' which was the expression counsel had used during the trial. How could it be said that the 'Keris' was held in a threatening manner when it clearly was not so held?.

B [75] Further, as pointed out by counsel for the respondent, Dato' Yaakob (PW10) had testified that the 'Keris' is a symbol representing Malay sovereignty, dignity, identity, supremacy and the politician in the photograph had used the 'Keris' to officiate at a ceremony, that the way the politician held the 'Keris' reflected a symbol of the culture of the Malays which had been C practiced for hundreds of years. According to PW10 the 'Keris' had also been held so by previous Prime Ministers while the same politician had held the 'Keris' at least twice before in 2006 and 2007. How then can something which is part of Malay culture practiced over hundreds of years and at least twice more recently in 2006 and 2007 suddenly become a challenge and D threat to ordinary average Chinese non-Muslim voters in Bandar Kuching as alleged?

[76] With all respect, I do not think what PW1 said could be so. I agree with counsel for the respondent that the publication of that photograph in E the pamphlet can rightly be regarded as a mere political statement of the UMNO politician's posturing. It cannot be held to be an interference or attempt to interfere on the part of the respondent with the free exercise of any electoral right or intended or have the effect of creating fear in the minds of the voters in order to exercise their electoral right in favour of the respondent.

F

[77] In this regard, I refer to what was said in other cases regarding photographs in pamphlets allegedly used as undue influence during election time. In *Sudhir Laxman Hendre v SA Dange* 17 ELR 373, a pamphlet showing photographs of persons killed in Bombay by firing of guns were G published and at the top of the page there was a heading 'Marathas of Bombay, take revenge of this devilish murder'. Below the photographs were the words 'The Congress ballot box is besmeared with the blood of the Martyrs'. The court held that all these were political statements, however strong the words used therein, they do not amount to undue influence. It was H argued by the petitioner there that the pamphlets contained ghastly pictures and photographs of persons who were killed in the Bombay firings, and these pictures were bound to revive the memory of firings in Bombay and would therefore, amount to undue influence or a direct or indirect interference with the elector's right to freely exercise their power to vote. The court was not I prepared to say that the publication of these photographs on voting day amounted to undue influence which constituted any direct of indirect interference with the elector's right to freely exercise their power to vote. The court held that the picture and the poster were in substance a political statement to the voters, not an appeal on grounds of religion and community.

[78] I am aware that the facts of the above case are not on all fours with the facts here and that the court there was deciding in the context of s 123(3) of the Indian Representation of People Act, but I refer to the case to show that even where explicit photos of killings were published on polling day, in the context in which they appeared the court there regarded them as political statements. So too here where the photograph appeared in the pamphlet during the run up to the elections on 8 March 2008.

[79] With regard to the text of the statements in the pamphlet, I agree with counsel for the respondent that in the context in which the pamphlet was published, they were in substance political statements. It was a political appeal to the voters to support the DAP. With regards to these statements themselves, eventhough PW1 had said in his evidence in chief that 'our freedom was being deprived of, our freedom of religion was being jeopardised, the Sabah Government had prohibited the construction of Maza Statute and also the Prime Minister declared that Malaysia is an Islamic country' so he felt angry, PW1 admitted in his cross-examination that the contents of the pamphlet (exh P4) were true and had been known to him and to the public before the publication of the pamphlet. PW1 admitted that: (a) he had already heard of the issue of the Maza Goddess Statute long ago from the newspapers. He said it was in Kudat, Sabah; (b) he had heard about Indian temples being dismantled many years ago; (c) he knew NEP and it was unfair, and therefore there is a need for an opposition to raise it up; (d) he knew that the BN Government procurement is along racial lines; (e) he knew Bumiputra's equity participation is over 30%; (f) he knew Taib Mahmud had ruled Sarawak for 26 years. PW1 also said in his cross-examination that the three (3) political leaders are not right in declaring Malaysia an Islamic state and he would like politicians to go to Parliament to talk about that for him. PW1 also said that it is not right for major government contracts to be awarded to companies related to the Sarawak CM.

[80] In the light of PW1's own evidence on these matters, I do not see how it can be said that the statements in the pamphlet had interfered with or attempted to interfere with the free exercise of his electoral right or had created fear in his mind in the manner alleged. They were in substance political statements which could not have affected the mind of PW1 or the ordinary average Chinese non-Muslim voter in the Bandar Kuching constituency in the manner alleged.

[81] With regard to the evidence of Madam Wong Choon Lee (PW3), the petitioner relied heavily on her evidence to prove this charge. However, I found her evidence totally irrelevant respecting the contents of the pamphlet (exh P4 or exh P12) for the following reasons.

[82] The pamphlet was printed in both Chinese and English languages but it cannot be disputed that there are material differences between what is stated in Chinese and what is stated in English. It would have been open to the petitioner to frame his charges based on both the Chinese and English versions but the petitioner chose to confine and plead his case and frame his complaint on the English version. Accordingly, I hold that it is only the English version of the pamphlet which can be relied on to prove this charge. PW3 gave evidence in Chinese. She testified that 'I only know the Chinese version'. 'I don't know the English version'. 'I only know how to read Chinese'. From what she said herself it is clear to me that the English version of the pamphlet which was pleaded in the petition obviously could not have affected or influenced her mind in the manner alleged as she had never read it. Her whole evidence is irrelevant and inadmissible.

[83] If I am wrong in what I say and her evidence is relevant and admissible, I found her to be an unreliable witness whose evidence was worth very little weight. I say so for the following reasons.

[84] PW3 testified that she received the pamphlet exh P12 on 2 March 2008. However it would not have been possible for her to do so as in his cross-examination the petitioner's own witness Desmond Leong Kuk Sun (PW5) who was the printer of the pamphlet, admitted that he only delivered the pamphlet to the DAP headquarters at Rock Road on 5 March 2008. Although in his submissions counsel for the petitioner tried to discredit the evidence of PW5 as 'undisclosed fanciful imagination from the respondent and PW5', the fact remains that the petitioner did not seek to clarify PW5's evidence in his re-examination nor was he made a hostile witness. His evidence stands and the petitioner is bound by it. If what PW5 says is true and I have not been given any reasons to disbelieve him, then PW3 could not have received the pamphlet (exh P12) on 2 March 2008 as alleged.

[85] Quite apart from the above, PW3 is a member of SUPP and her husband is also a SUPP member. She was clearly a partisan witness who was politically ignorant as revealed by her misconception that DAP is the Government of Sarawak. Her demeanour while giving evidence and her refusal to answer questions put to her and instead ramble on about what she wanted to talk about despite the court having requested her to answer the question of counsel lead me to the conclusion that her evidence was tailored or coached.

[86] For all the reasons given above, I find that the second charge has not been proved beyond reasonable doubt against the respondent. The petitioner has submitted that the respondent did not call any evidence to prove or substantiate what appeared in the pamphlet 'AFTER 50 YEARS OF

INDEPENDENCE ....'. I find that the evidential burden had not shifted onto the respondent at all in respect of this charge for the reasons given above.

THE THIRD CHARGE

[87] The third charge relates to the corrupt practice of bribery by the respondent allegedly making a promise to give voters in the Bandar Kuching a 'Malaysian bonus of up to RM6,000 for those with household income of RM6,000.00 or less per annum', in that the respondent or with his knowledge or consent published and distributed 'DAP 2008 ELECTION MANIFESTO' on or about 25 February 2008 in order to induce the voters in the constituency to vote for him. It is the petitioner's case that the main thrust of the 'DAP 2008 Election Manifesto" was to deny a two-third majority to the BN Government in Parliament.

[88] To prove this charge evidence was adduced through the petitioner himself (PW1), Medrict Jukai AK Empaka (PW2) and Supramaniam a/l Raman (PW4), all of whom were registered voters in the Bandar Kuching constituency who testified to the effect that they each received a copy of the 'DAP 2008 Election Manifesto' which the court marked as exh P5, exh P11 and exh P14 respectively, and as a result of the promise of the RM6,000 contained in exh P5, PW1 said he was induced to vote for the respondent; PW2 said as a result of what was stated in exh P11 he refrained from voting; while PW4 said as a result of the promise contained in exh P14 he voted for DAP. It is the case of the petitioner that the promise of RM6,000 to those with household income of RM6,000 or less clearly constituted an act of bribery within the meaning of s 10(a) of the Act.

[89] The respondent contends that this charge is not proved on several grounds. I shall address each in turn.

[90] First, that on the petitioner's pleaded case and on the evidence led in court the charge cannot be sustained. In support of this contention the respondent points out, rightly in my view, that by the petitioner's, own pleadings, he pleaded that:

(i) the respondent Chong Chieng Jen was guilty of an offence of the corrupt practice of bribery by *making a promise* to give voters in the said constituency a '*Malaysia bonus of up to RM6,000.00*' (see para 3(3) of the petition);

(ii) the respondent published or distributed the manifesto on or about 25 February 2008 (see para 3(3) of the petition);

A (iii) the said manifesto was launched by Mr Lim Guan Eng, Secretary General of DAP on 25 February 2008 at DAP Party Headquarters (see para 3(3)(b) of the petition);

(iv) the manifesto was available in four (4) different languages. Bahasa Malaysia, English, Chinese and Tamil (see para 3(3)(e) of the petition);

B

(v) the manifesto bears such words as 'The election is not about the candidates. It is about the voters. Help us deny Barisan Nasional a two-third majority and we will take care of you' (see para 3(3)(b) of the petition).

C

[91] However, the respondent pointed out that evidence adduced in court shows that the manifesto which PW1 received and which was marked exh P5 is the Sarawak DAP manifesto. PW1 testified that he received exh P5 in his mailbox at Jalan Stutong, that exh P5 bears seven (7) photographs of DAP candidates contesting in Sarawak, that the RM6,000 is not to be paid by Chong Chieng Jen (the respondent), that manifesto is about a party's policy.

D

[92] An examination of exh P5 (and also exh P11 and exh P14) show that it is written in three (3) languages, Chinese, English and Bahasa Malaysia and that the words '*Malaysia Bonus*'does not appear in exh P5 and that the phrase: 'The election is not about the candidates. It is about the voters. Help us deny Barisan Nasional a two-third majority and we will take care of you' do not appear in exh P5. In exh P5, the words are '*GO FOR CHANGE, DENY BN 2/3 MAJORITY. Enough is enough*'.

E

F

[93] The respondent further points out that the evidence shows that Lim Guan Eng launched the DAP national manifesto on 25 February 2008 at the DAP Headquarters, but exh P5 the Sarawak DAP manifesto was not even printed in Sibu yet. Exhibit P5 was not printed until 3 March 2008 and it was not received by DAP Kuching until 4 March 2008. The respondent testified that the manifesto launched by Lim Guan Eng on 25 February 2008 was not supplied to Sarawak DAP nor distributed in Sarawak.

G

H **[94]** It was the submission of the respondent that from the evidence adduced in court, it is clear that exh P5 (the Sarawak DAP manifesto) is not the same manifesto launched by Lim Guan Eng on 25 February 2008 which is the manifesto pleaded and relied on by the petitioner in the election petition. It is the respondent's case that since exh P5 (the Sarawak DAP manifesto) is not the one pleaded it is irrelevant to the petitioner's case and ought not to be taken into consideration in this case.

I

[95] The petitioner has responded to this point by saying that the real issue in this charge is whether bribery of voters had taken place and this issue has

been sufficiently raised in the pleadings and through the particulars supplied the allegation that a promise to give RM6,000 for households earning less that RM6,000 or less per annum had been pleaded. Therefore, he should be allowed to use the Sarawak DAP manifesto to prove this charge.

[96] I do not agree with the petitioner. I find the respondent's point well taken and with merit. It is a well settled principle of adjectival law that no party can go beyond his own pleadings by which he is bound. In *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330, the then Supreme Court approved of the following passage in the decision of Sharma J in the case of *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196:

> In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[97] It is very clear to me that the case made out by the petitioner in his pleadings is that the promise to give voters in the Bandar Kuching constituency a Malaysia bonus of RM6,000 for those with household income of RM6,000 or less per annum, was contained in the DAP 2008 Election Manifesto which was launched by Lim Guan Eng on 25 February 2008 at DAP Party Headquarters, which is the DAP national manifesto. According to the petitioner's pleadings it is the DAP national manifesto that contained the offer of the promise of money which induced the voters to vote for the respondent.

[98] But the evidence before the court shows that the manifesto launched by Lim Guan Eng at the national level (DAP national manifesto) in the DAP Headquarters and the manifesto launched by DAP Sarawak State Chairman Wong Ho Leng are not the same. It is equally clear to me that the case which the petitioner now tries to make out is that the promise of money and the inducement to vote for the respondent was contained in exh P5 ie the Sarawak DAP manifesto which is clearly not his pleaded case and which he cannot be allowed to do. It is clear from the evidence of PW1, PW2 and PW4 that they each received the Sarawak DAP manifesto as a result of which they were allegedly induced to vote for the respondent or to refrain from voting. But the use of the Sarawak DAP manifesto was not the pleaded case of the petitioner. In *Doabia's Election Manual* (4th Edn 1967) Vol 2 p 501, the learned author wrote with regard to the charge of bribery that:

> Clear and unequivocal proof is required before a case of bribery can be established. The allegation made should be of a definite nature. The evidence to prove a corrupt practice other than that alleged cannot be allowed to be adduced: *Sarla Devi Pathak v Brender Singh* 20 ELR 275.

A **[99]** So too here. The petitioner cannot rely on the evidence that it was what was stated in the Sarawak DAP manifesto that induced PW1, PW2 and PW4 to vote or not to vote to sustain this charge, when it was never alleged in the election petition to be so.

B **[100]** In answer to the contention of counsel for the petitioner that the issue of bribery had been sufficiently raised by pleading that the promise of RM6,000 had been made and so other evidence may be relied on in support of the charge, I would say that whilst it is true that the allegation about the promise of RM6,000 was pleaded, it was expressly pleaded that the promise C was made by the DAP 2008 Election Manifesto available in four (4) different languages and a sensible reading of the whole of para 3 of the election petition shows that the 'DAP 2008 Election Manifesto' being referred to is the DAP national manifesto launched at DAP Headquarters on 25 February 2008 and not the Sarawak DAP manifesto which did not even exist on that D date. Since it was not a part of the petitioner's pleaded case that the voters were induced by what was stated in the Sarawak DAP manifesto, he cannot be permitted now to make out a case different from what he pleaded. Without being able to rely on the evidence of the Sarawak DAP manifesto (exh P5), the charge of bribery cannot be sustained. It is not proved and must E fail.

[101] If I am wrong in what I have said, I go on now to consider whether it is proved that the alleged bribery has occurred, in that, PW1, PW2 and F PW4 were induced to vote or refrain from voting as a result of the promise of the Malaysia bonus of RM6,000.

[102] Two questions arise here: (a) whether they were so induced as alleged and (b) even if they were, was the promise of the Malaysia bonus a corrupt G practice?

[103] With regard to question (a), it should be noted that the petitioner does not seek to avoid the respondent's election on the ground that general bribery has occurred in the Bandar Kuching constituency (under s 32(a) of H the Act). The case he puts forward is that three (3) voters in the person of PW1, PW2 and PW4 were induced to vote or refrain from voting by what was stated in the election manifesto they each received, which the evidence shows was the Sarawak DAP manifesto exh P5. It is not their evidence that they were induced by what they read in the newspapers or other news media. I The question is: Did these witnesses receive the manifesto so as to read it and be thereby induced as alleged? I do not think so. PW1 alleges he received exh P5 in the mailbox of his house at Stutong, while PW2 said he received it from DAP supporters at Tabuan Jaya coffee shop on or about 4 March 2008, while PW4 said he received the manifesto at his house one (1) week

before the election (which was on 8 March 2008). But it was the evidence of the respondent that the Sarawak DAP manifesto (exh P5) was never distributed out door to door to the residences of the electorate within the Bandar Kuching constituency. It was also his evidence that the Sarawak DAP manifesto (exh P5) was not delivered to the Kuching DAP office by the DAP Sibu office until 4 March 2008, and owing to its limited copies (3,000) were not distributed to the voters until 6 and 7 March 2008 during DAP *Ceramahs* at night held by the respondent in Bandar Kuching constituency and by Voon Lee Shan in Stampin constituency. I accept the evidence of the respondent on his point. He explained both in his evidence in chief and cross-examination why the Sarawak DAP manifesto was not distributed door to door in his constituency and why only 3,000 copies were available for distribution at *Ceramahs*. The respondent said in cross-examination:

> When the helpers go out to distribute pamphlets, each would have hundreds or even thousands of pamphlets to distribute. Therefore, it is our arrangement that if one batch of helpers go out, they would only distribute one type of pamphlet each time. It takes them about a day or two to distribute one type of pamphlet to all the houses and shops within the constituency of Bandar Kuching. We timed the printing of our pamphlets at the interval of two days per pamphlet. We have about 5 pamphlets during the election time. If we were to have our Sarawak DAP manifesto distributed door to door, we have to assign an additional batch of helpers, we have to reimburse than on the fuel, food and on top of that if we were, to have our manifesto distributed door to door, we will need at least 50,000 copies of booklets just to cover the two constituencies in Bandar Kuching and Stampin. Since the contents are all reported in the newspapers, we decided to save cost and just to hand over the 3,000 copies in the *Ceramahs* in Bandar Kuching and Stampin.

[104] I find nothing improbable in the explanations. The respondent's explanation for not distributing the manifesto house to house ie manpower and financial constraints in his election campaign, and his evidence that the Sarawak DAP manifesto was only distributed two days before polling which I view as a matter of his own political strategy, is not unbelievable to me.

[105] For these reasons, I find that PW2 and PW4 could not possibly have received the Sarawak DAP manifesto on the dates they claim to have allegedly received them when the same were not even printed, and PW1, PW2 and PW4 could not possibly have received the same at the places stated by them when the same were distributed only on 6 and 7 March 2008 at the Ceramahs, so as to have read the Sarawak DAP manifesto and be induced by what was stated in it as alleged. I do not believe their story on this point.

[106] Another reason for saying that PW1 and PW4 could not have been induced by what they allegedly read in the manifesto about the promise of

RM6,000 is that the amount was stated to be payable to those with household income of RM6,000 or less per annum. The word 'Household' is defined in *Black's Law Dictionary Revised* (4 Edn) at p 873 as meaning: 'A family living together. Those who dwell under the same roof and composed a family'. *Webster*: 'A man's family living together constitutes his household, though be may have gone to another state'.

[107] PW1 told the court that his household income was about RM3,000 to RM4,000 per month. He had a son who worked as a bank officer earning about RM2,000 to RM3,000 per month and that his son gave him about RM1,800 per month. PW4 told the court that his income was about RM400–RM450 per month and his wife's income was RM500 per month and his eldest daughter worked in the customs department.

[108] It is clear to me that both PW1 and PW4 enjoyed household income well in excess of RM6,000 pa and they must have known that they were not entitled to the Malaysia bonus of RM6,000 and so could not have been influenced or induced by what was stated in the manifesto as they alleged.

[109] As far as PW2 is concerned, I do not believe his story that he refrained from voting because he was induced or influenced by what was stated in the Sarawak DAP manifesto. In his cross-examination PW2 admitted that he came to court to lie. It was put to him:

> Put: That you came to this court to lie.
>
> A: That was because of these people ....

[110] And when it was further put to him:

> Put: That you came to this court for one purpose only and that purpose is to earn some money.
>
> A The court recorded that the witness does not answer.

[111] Later on PW2 was asked in re-examination by the petitioner's own counsel.

> Q: Yesterday you were also asked whether your only reason to come to court was to make money. But you didn't answer and kept quiet. I want to ask you, did you come to court to make some money.
>
> A: Yes.

[112] Chairman of SUPP Youth Central. PW2 came to give evidence as a

witness because he wanted to earn money and he was prepared to lie to do so. His evidence regarding having refrained from voting because of what was stated in the Sarawak DAP manifesto cannot be believed at all.

[113] Turning now to question (b) ie was the promise of the Malaysia bonus a corrupt practice? I find that it was not. I say so for the following reasons.

[114] *Black's Law Dictionary* (8th Edn) defines a manifesto as a formal written statement publicly declaring the issuer's principles, policies or intentions. Looking at the Sarawak DAP manifesto as a whole which runs to some 15 page, of which the promise to 'Declare bonus up to RM6,000' was only one of the many topics raised in the manifesto. Reading the manifesto in a fair, objective and reasonable manner, I agree with learned counsel for the respondent that the document contained only a declaration to the general public of Sarawak DAP's public policy or promise of public action without interfering with the free exercise of the electoral right of the voters. The manifesto highlighted and explained the DAP's election pledges and appeals to the electors to vote DAP candidates for a change for better quality of education, a brighter future for children, to promise effective check and balances in government, and in that part dealing with 'Better Living Standard' a 'Declaration bonus of up to RM6,000 for those with household income of RM6,000 or less per annum' is found along with some seven (7) other promises like improving the roads and infrastructure and to build a railway system in Sarawak, a promise of quality accessible and affordable healthcare for all Malaysians, and to create employment opportunities to name a few.

[115] In *Gangadhar Maithani v Narendra Singh Bhandari* 18 ELR 124, it was held that a promise of public action which does not bring any private or personal benefit to voters but giving advantage to the benefit of the whole constituency, and a declaration of public policy, cannot possibly be regarded as bribery within the meaning of s 123(1) of the RPA of India. Also in *Dhartipakar v Rajir Gandhi* AIR 1592 SC, it was held that the declaration of public policy or a promise of public action or promise to develop the constituency in general do not interfere with the free exercise of electoral rights as the same do not constitute bribery or undue influence. In my judgment, the Sarawak DAP manifesto was a normal election manifesto of a political party promising public action to amongst other things better the living standards of the public at large including those whose household income per year is less than RM6,000. The promises made in the manifesto is not one where individual or personal advantage can be obtained. Neither was the manifesto made for the benefit of one person, the public promise was made for the benefit of all voters and not just for voters in Bandar Kuching

nor was it a promise by Chong Chieng Jen the respondent personally. It is clear that the manifesto belonged to all the DAP candidates contesting in Sarawak and was not a manifesto of the respondent only. Besides, there is no suggestion that the RM6,000 would be paid by the respondent to the voters from his personal funds. The respondent was not the only DAP candidate in the election and there is no reason why he should pledge his personal fortune in exchange for votes of other constituencies. The manifesto was clearly meant for the benefit of the Sarawak DAP party as a whole and nor did it make the promise of the RM6,000 on condition that the voters vote for the respondent.

[116] From the authorities or case law cited to me by both parties, it is essential for the purpose of proving the corrupt practice of bribery, to establish an element of 'bargain' with voters for their votes (see *Wong Hua Seh v Abang Mohd Porkan bin Hj Abang Budiman & Ding Kuong Hiing* (Sibu High Court Election Petition 26 January 2008) where the authorities are reviewed. I find no evidence of the element of bargain between the respondent and the voters in Bandar Kuching constituency. The promise in the manifesto so clearly calls for public action which will benefit the public as a whole in Sarawak. It clearly cannot constitute bribery.

[117] For all the above reasons, I find that a case has not been made out of any infraction of s 10(a) and s 32(c) of the Act. This charge has not been proved beyond reasonable doubt. It fails.

THE FOURTH CHARGE

[118] The charge here is that the respondent had exerted undue influence over the voters in the Bandar Kuching constituency in the manner stated in the petition in that the respondent is alleged to have published or with his knowledge or consent published false statements in a pamphlet or campaign material entitled 'CORRUPTION-OUR NO 1 ENEMY', so as to induce the voters to vote for him.

The pamphlet contained the following statements:

> Morgan Stanley estimates that since our country losses US100,000.000.00 through corruption which has resulted in increased business operation costs, devaluation of Ringgit and real income and increased financial burden of the people, making the rich richer and the poor poorer.
>
> Police corruption is now at its worst, crime rate likewise. Malaysia recorded an unprecedented 200,000 reported crimes in 2007.
>
> To improve our economy, we need to clean up the BN politicians.
>
> Barisan Nasional has no political will to fight corruption.

A STRONGER DAP WILL FORCE BN GOVERNMENT TO CHANGE FOR THE BETTER. A

[119] It is the petitioner's case that what is stated above are false statements or imputations made intentionally and maliciously to invoke anger in the voters in Bandar Kuching constituency so that they would be influenced to vote against the Barisan Nasional. B

[120] The respondent contended that this charge should be struck out as it does not disclose a complete cause of action in that it is vague embarrassing and not precise as the exact nature of the false statements or imputations is not made clear. I do not agree. The petitioner has given particulars that it is the statements in the pamphlet that are false statements or imputations. 1 do not think the charge is embarrassing or vague as alleged. C D

[121] The issue in this charge is whether the publication of the pamphlet by the respondent, of which there is no dispute, constitutes a ground on which his election may be avoided. The petitioner's pleaded case is that by publishing the pamphlet, the respondent had committed an offence of corrupt practice of undue influence by reason whereof his election may be avoided under s 32(c) of the Act. E

[122] With regard to the statements in the pamphlet 'Corruption-Our No 1 Enemy' (exh P6), Mr Desmond Leong (PW5) testified in court that the pamphlet was delivered to the DAP Kuching Office on 2 February 2008 together with the bill dated 2 February 2008. It was before the Chinese New Year (The Chinese New Year fell on 7 February 2008). It is not in dispute that nomination day for candidates in the election was on 24 February 2008. F G

[123] The petitioner (PW1) testified in court under cross-examination that he received the pamphlet (exh P6) in his mailbox sometime before the Chinese New Year in 2008. PW1 also told the court that he was not sure of the exact date but he knew it was before Chinese New Year. PW1 also agreed in his cross-examination that the pamphlet (exh P6) had nothing to do with the election. He also conceded that the pamphlet (exh P6) has no reference to Mr Sim Yaw Yen. H

[124] It will be recalled that the petitioner seeks to avoid the respondent's election on this ground under s 32(c) of the Act. To constitute a ground under s 32(c), it is an essential ingredient that the corrupt practice must be committed *in connection with the election*, and the alleged act must be committed by *the candidate, or* with the *candidate's* knowledge or consent or by the candidate's agent. Since nomination day fell on 24 February 2008 and I

A the pamphlet (exh P6) was received by PW1 before Chinese New Year on 7 February 2008, I agree with learned counsel for the respondent that it cannot be said that the act of corrupt practice was committed by the *candidate* or with the *candidate's* knowledge or consent and that it was committed in *connection with the election*, there being no candidate within the meaning of
B s 32(c) of the Act until 24 February 2008 which was nomination day. A 'candidate' is defined in s 2 of the Act as 'a person who is nominated in accordance with any regulations made under this Act as a candidate for the election'. That being the case, I do not find this charge made out under s 32(c) of the Act.

C

[125] If I am wrong in what I say, I still find this charge not made out for the following reasons.

[126] There is no evidence before the court that the minds of the voters in
D Bandar Kuching constituency were so influenced or over powered by what was stated in the pamphlet (exh P6) that they could not freely exercise their electoral rights. PW1 did not give any evidence of that sort at all. In fact PW1 said that Chinese phrases, words and images in the pamphlet are used during
E Chinese New Year and that even though the pamphlet says 'Strengthen DAP', he does not find it objectionable. What PW1 said certainly cannot support an allegation of undue influence.

[127] The petitioner has pleaded in para 3(4)(b) of the election petition as
F part of his particulars that the petitioner is alleged to have committed an offence under s 4A of the Act. But s 4A is not categorised or classified as an offence of corrupt practice or illegal practice within the meaning of s 32(c) of the Act. The offence (under s 4A) is clearly outside the ambit of corrupt practice or illegal practice and not within the meaning of s 32(c). Although
G a conviction under s 4A by the court will entail a disqualification for membership of Parliament and may be a ground for avoiding the respondent's election under s 32(b) of the Act (which has not been pleaded in this case at all) but clearly not do so under s 32(c).

H **[128]** With regard to the other particulars set out by the petitioner in para 3(4)(c) of the election petition which alleged false statements of fact affecting the personal conduct or character of Sim Yaw Yen as a candidate, I agree with learned counsel for the respondent that a close examination of the pamphlet (exh P6) shows that it talks nothing about Sim Yaw Yen nor do the
I statements in the pamphlet concern Mr Sim Yaw Yen or his personal conduct and character neither as a candidate nor with conduct of the election.

[129] For all the reasons given above, I find this charge not proved beyond reasonable doubt against the respondent. A

THE FIFTH CHARGE

[130] In this charge the petitioner alleges that the respondent exercised undue influence over the voters in the Bandar Kuching constituency by the various ways described in his petition by publishing or with his knowledge or consent publishing a pamphlet entitled 'SAY 'ENOUGH IS ENOUGH' TO SUPP, SAY 'NO' TO CM' (exh P8). It is alleged that this pamphlet contained misleading imputations against Mr Sim Yaw Yen so as to induce or compel the voters to vote for the respondent. B C

[131] The petitioner alleges that in the pamphlet (exh P8) the respondent alleged that there was impropriety in relation to the award of government contracts to two (2) companies ie Titanium Management Sdn Bhd, and Cahya Mata Sarawak Berhad due to family ties between some of the shareholders in these companies and the Chief Minister of Sarawak. In relation of Titanium Management Sdn Bhd, the pamphlet alleges that a contract to build 322 bridges was improperly awarded to it as the Chief Minister's son is one of its shareholders. Also, included in the pamphlet (exh P8) is a table which lists the projects awarded by the government to Cahya Mata Sarawak Group. In addition to the statements, photographs of two (2) SUPP leaders (but not Sim Yaw Yen) appear in the pamphlet which the petitioner alleges is to impute to the voters in Bandar Kuching constituency that SUPP leaders are powerless to stop the Chief Minister and his family in the alleged improprieties. D E F

[132] The respondent in his evidence explained that the information in the pamphlet (exh P8) regarding Titanium Management Sdn Bhd is based on the Auditor-General Malaysia's Report for 2006 (exh D73) while that about Cahya Mata was obtained from the website of Cahya Mata Sarawak Berhad itself. G

[133] According to the petitioner the statements in the pamphlet (exh P8) contain false imputations or misrepresentations which were deliberately intended to mislead the voters in the Bandar Kuching constituency that Sim Yaw Yen was powerless to stop the alleged improprieties of the Chief Minister and his family in order to compel and induce the voters to vote for him. H I

[134] In his evidence the petitioner PW1 said this about the pamphlet (exh P8):

A I understand what was written there. When I read it before election, I believe it. My overall reaction on the matters before the election was all the projects in Sarawak were monopolised by the CM's son's company. This will cause us to be angry with the government and it will lead the votes to be cast for the opposition. I believe it because there was a specific amount mentioned for the projects and also what type of projects is mentioned. The other reason I believe it because in the second page of the pamphlet there is also a photo or our second Finance Minister, Dato' Sri Wong Soon Koh. The other reason is that in the front page of the pamphlet there is a photo of our CM and President of SUPP. In this picture, the SUPP President has been demonised. Indirectly the picture influence or leads the voters to vote for the opposition.

[135] It is clear to me that the allegation in the charge which is pleaded against the respondent is that he published statements containing misleading imputations against Sim Yaw Yen who was the rival candidate to the respondent in the Bandar Kuching constituency. However, examining the pamphlet (exh P8) and what is stated there and considering the evidence adduced in court whether through PW1 or otherwise, they just do not touch or concern Sim Yaw Yen at all, neither with regard to his public and political activities, nor to his personal conduct and character too. There is a world of difference between saying SUPP dare not speak up for the people on the one hand and saying that Sim Yaw Yen dare not do so on the other hand. One is a reference to a political party and the other is a reference to the personal qualities of an individual. Here the charge is that the misleading imputations are against Sim Yaw Yen personally and not against the SUPP party or Dato' Wong Soon Koh. The evidence adduced by the petitioner relating to this charge is totally irrelevant to the charge pleaded in the petition and cannot be acted on.

[136] Even if the evidence is not irrelevant and may be acted on, I just do not see how the evidence can support a charge of undue influence under s 9(1) of the Act. Since nothing at all was said in the pamphlet regarding Sim Yaw Yen and given the fact that PW1 had testified that the statements in the pamphlet (exh P8) were true and given further PWl's admission that the statements do not concern the candidate Sim Yaw Yen at all, I just do not see how it can be said that PW1's mind or that of any other voter in Bandar Kuching was so overpowered that they were left with no free will in the exercise of their electoral rights and were compelled or induced to vote for the respondent.

[137] For all the reasons given above, I find that this charge has not been proved against the respondent beyond reasonable doubt. In his submissions, learned counsel for the petitioner said that the respondent had not called any evidence to prove that the statements in the pamphlet were true. The short answer to that submission which was also made in respect of the other charges

is that I did not find that the evidential burden had shifted onto the respondent to do so on this and all the other charges in the petition.

[138] In the result, I have found none of the five (5) charges pleaded against the respondent proved beyond reasonable doubt. I accordingly dismiss the petition with costs to the respondent. In accordance with s 36(1) of the Act, I declare that the respondent Chong Chieng Jen was duly elected as the Member of Parliament for the Bandar Kuching constituency of P195, and shall certify this decision to the Election Commission and also report in writing to the Election Commission as required by s 37 that no corrupt practice has been proved to have been committed by the respondent or with his knowledge and consent as alleged by the petitioner or at all.

Petition dismissed with costs.

Reported by Andrew Christopher Simon